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05-5705

Supreme Court, U.S.
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No. 05-

IN THE
SUPREME COURT OF THE UNITED STATES

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HERSHEL HAMMON,

Petitioner

v.

STATE OF INDIANA,

Respondent.

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On Petition for Writ of Certiorari to the
Indiana Supreme Court

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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## PETITION FOR A WRIT OF CERTIORARI

Hershel Hammon respectfully petitions for a writ of certiorari to the Indiana Supreme Court in *Hammon v. State*, No. 52S02-0412-CR-510.

## OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 829 N.E. 2d 444 (Ind. 2005), and is attached at A1-A16. The opinion of the Indiana Court of Appeals is published at 809 N.E.2d 945 (Ind. App. 2004), and is attached at A17-A25. The relevant order of the trial court is unpublished.

## STATEMENT OF JURISDICTION

The Indiana Supreme Court issued its opinion on June 16, 2005. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

## STATEMENT OF THE CASE

This case presents a scenario that recurs frequently: Police officers come to the scene of a reported crime, and a declarant, typically the alleged victim, makes an accusatory statement to one of the officers. At the trial of the accused, the declarant does not testify, the prosecution offers evidence of the statement made by the declarant to the responding officer, and the accused objects that, unless he is given an opportunity to cross-examine the declarant, use of the statement violates his right under the Confrontation Clause "to be confronted with the witnesses against him." Since this Court's transformative decision in *Crawford v. Washington*, 541 U.S. 36 (2004), some courts have recognized

that admitting such evidence is improper, because it would effectively allow a prosecution witness to testify at the scene of the crime, without subjecting herself to the procedures – most notably cross-examination – that the Constitution affords the accused. But other courts, including the Indiana Supreme Court in this case, have treated such statements as non-testimonial, and so beyond the scope of *Crawford*. This case therefore reflects a clear and important conflict among the lower courts. It is a conflict that only this Court can resolve. The public interest calls for it to be resolved promptly. And, if *Crawford* is not to be substantially undercut and subject to manipulation, the judgment of the Indiana Supreme Court should be reversed.

Responding to a report of a domestic disturbance, Officers Jason Mooney and Rod Richard of the Peru Police Department came to the house of Petitioner Hershel Hammon and his wife Amy on the evening of February 26, 2003. Amy was the first person they encountered; according to Mooney's testimony at trial, she appeared to be "timid" and "frightened." Mooney testified that he asked whether there was a "problem" or "anything was going on," and that Amy replied in the negative. 829 N.E.2d at 446-47.

Mooney sought and received permission from Amy to enter the house. There he found indications of an altercation: In the corner of the living room, the glass front of a gas heating unit was broken, with fragments of the glass on the floor and flames emerging as a result. *Id.* at 447. Mooney found petitioner in the kitchen and asked what had happened. Petitioner answered that he and Amy had "been in an argument" but that it "never became physical" and "everything was fine now." *Id.* Richard remained with Hershel in the kitchen while Mooney went to speak with Amy once again. This time, according to Mooney's testimony,

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater When it became physical he threw her down into the glass of the heater She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

*Id.* Mooney then asked that Amy compete and sign a battery affidavit, and she did so *Id.* The affidavit was on a prepared fill-in-the-blank form that Mooney apparently had with him and that tracked the language of the battery statute, IC 35-42-2-1, by alleging in general terms that the defendant "did knowingly touch" the victim "in a rude, insolent and angry manner," resulting in bodily injury to the victim. Record on Appeal [hereinafter R.A.] 40, p. A35.. In the longest blank, which contained the instruction "Describe the Acts," Amy wrote the following:

> Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

829 N.E.2d at 447 n.1. She then signed her name twice, once under an acknowledgment that the "investigating officer" was relying upon her allegations "as establishing Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1." and once under an affirmation that the representations in the affidavit were true, that she understood the provisions of the "false informing statute," and that she was reporting a crime. R.A. 40, p. A35.

The State charged Petitioner with Domestic Battery, a Class A misdemeanor. On May 9, 2003, the Circuit Court of Miami County held a bench trial on this charge, consolidated with a hearing on an allegation that the incident violated the terms of

Petitioner's probation on an earlier battery conviction. Amy was not present at the consolidated proceeding. Although the state had subpoenaed her, it never made any attempt to show that she was unavailable for trial. Over Petitioner's objections, the court admitted both Officer Mooney's testimony reporting Amy's oral statements and Amy's affidavit. The court rejected hearsay objections on the grounds that the oral statement fit within the excited utterance exception to the hearsay rule and that the affidavit was a present sense impression. The only other evidence was brief testimony by the secretary of the county probation department establishing Petitioner's probation status. Petitioner offered no evidence.

The trial court convicted Petitioner of Domestic Battery and also found that he had violated the terms of his probation. The court sentenced Petitioner to a prison term of one year, with all but twenty days suspended. It also instructed him to complete a drug and alcohol evaluation and a counseling program.

Petitioner took an appeal to the Indiana Court of Appeals, which affirmed the decision of the trial court in material part.[1] The appellate court agreed with the trial court that Amy's oral statement was an excited utterance. Because this Court decided *Crawford* while the appeal was pending, the court of appeals considered whether the oral statement was testimonial within the meaning of *Crawford*.[2] Under *Crawford*, if the

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[1] The appellate court reversed the trial court's decision that Petitioner's cash bond be retained.

[2] In objecting at trial to the admission of Amy's statements, Petitioner's counsel did not invoke the Confrontation Clause by name, but he made a continuing objection on grounds of hearsay to her statements. Trial Transcript [hereinafter T.T.] 10, p. A26, and with respect to the affidavit he elaborated vigorously that he did not have the opportunity to cross-examine the alleged drafter. "Makes me mad," he said. T.T. 13, p. A29. Given that the case was tried before this Court's decision in *Crawford*, Petitioner can hardly be

statement was testimonial in nature, it could have been admitted against Petitioner only if he had an opportunity to cross-examine Amy *and* she were shown to be unavailable, but neither of these conditions was true. The court held, however, that the statement was not testimonial, and it concluded that admission of the statement did not violate Petitioner's rights under the Confrontation Clause. The court did not reach the question of whether admission of the affidavit was erroneous, because it concluded that the affidavit was "cumulative" of the report of Amy's oral statement, so any error in admitting the affidavit was harmless. In reaching the conclusion that Amy's oral statement was not testimonial, the court emphasized that the statement lacked a formal quality and that the statement was not, in its view, made in response to interrogation.

The Indiana Supreme Court granted a petition for transfer, *Hammon v. State*, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004), but it affirmed the ruling of the trial court with respect to Petitioner's conviction.[3] While recognizing that it was "unclear precisely how much time had passed between the event and the statement," the court agreed with the lower courts that Amy's statement was excepted from the rule against hearsay as an excited utterance under Indiana Rule of Evidence 803(2). The court then turned to the Confrontation Clause issue, focusing on the meaning of the term "testimonial." After reviewing the decisions of the court of appeals in this case and of courts from other

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faulted for not making an explicit Confrontation Clause objection in addition to the hearsay objection; before *Crawford*, if the statement fit within the excited utterance exception to the hearsay rule, that would resolve any Confrontation Clause objection. White v. Illinois, 542 U.S. 346 (1992). In any event both the court of appeals and the supreme court treated the Confrontation Clause objection as being preserved and reached the merits of it.

[3] The State did not contest the ruling of the court of appeals with respect to the cash bond, and the supreme court summarily affirmed the ruling of the court of appeals on that point.

jurisdictions, the supreme court distanced itself from the court of appeals' analysis but nevertheless concluded that

> a testimonial statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either be principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motivation of the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

829 N.E.2d at 456.

Focusing on *Crawford*'s reference to statements made in "police interrogations," the supreme court drew the inference that such an interrogation "is properly limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." Thus, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." 829 N.E.2d at 457.

Turning to the facts of the case before it, the supreme court asserted that "the motivations of the questioner and declarant are the central concerns." Though it noted the absence of findings on point, the court then concluded that what it characterized as "the initial exchange between Mooney and Amy"

> fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial.

829 N.E.2d at 457-58. Thus, the court held that Amy's oral statements were not testimonial, and there was no error in admitting them. The court also held that admission

of the affidavit violated Petitioner's confrontation right, and it indicated that if the case were tried to a jury the error may not have been harmless, despite the fact that it "merely repeated the substance of Amy's statements to Officer Mooney," because "the formality of the affidavit may have lent credibility in a jury's mind." But, given that the case was tried to the bench, the court concluded that the error was harmless. 829 N.E.2d at 459. Accordingly, Petitioner's conviction was affirmed. Petitioner now seeks review of the supreme court's judgment.

## REASONS FOR GRANTING THE WRIT

### I. THE LOWER COURTS ARE IRRECONCILABLY DIVIDED ON THE QUESTION OF WHEN ACCUSATIONS MADE TO A RESPONDING OFFICER ARE TESTIMONIAL.

Probably the most frequently litigated, and the most hotly contested, issue in light of *Crawford* is that of what might be called a fresh accusation – that is, a statement made to a police officer or other person affiliated with the criminal justice system and making an accusation that another person committed a crime a short time before. This case is a good example of one of the principal species within that genus – here, the accusation was made not in an emergency telephone call to a 911 system but to a police officer responding at the scene. In most of these cases, the statement escapes the rule against hearsay because it is deemed to fit within the exception for excited utterances, or spontaneous declarations. Before *Crawford*, that would have been enough to satisfy the Confrontation Clause as well, because that exception was deemed to be "firmly rooted." *White v. Illinois*, 542 U.S. 346 (1992). But under *Crawford*, characterizing the statement as an excited utterance does not address the confrontation question.

It does not require profusion of citations to demonstrate that the lower courts are divided in how to treat these cases. Indeed, the Indiana Supreme Court reviewed the division in its opinion in this case. 829 N.E.2d at 452-56. *See also, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 779 (2005) ("Courts that scrutinize victims' statements to responding officers look to a long list of considerations, and apply these considerations inconsistently.").

At one end are courts that apply what we believe to be the proper test. They regard as testimonial all accusations that the declarant could reasonably expect to be used to help prosecute the accused. Accusations made to responding officers clearly fit within this category, as do many statements made in 911 calls. This conclusion is not altered by the possibility that the declarant may have had other purposes in making the statement, because the question is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. *E.g.*, *United States v. Arnold*, 410 F.3d 895, 903-04 (6th Cir. 2005); *United States v. Summers*, ___ F.3d ___, 2005 WL 1694031 (10th Cir. Jul. 21, 2005) (utterance deemed to be an assertion made by *conspirator* of accused to arresting officer held to be testimonial); *Moody v. State*, 594 S.E.2d 350, 354 n.6 (Ga. 2004) ("the [*Crawford*] Court stated that the term [testimonial] certainly applies to statements made in a police interrogation, and it appears that the term encompasses the type of field investigation of witnesses at issue here"); *Gay v. State*, 611 S.E.2d 31 (Ga. 2005) (quoting *Watson v. State*, 604 S.E.2d 804 (Ga. 2004): "statements made to police officers during an investigation qualify as testimonial").[4] *See also State*

[4] *Accord, e.g.*, Miller v. State, ___ S.E.2d ___, 2005 WL 1423393 (Ga. App. June 20, 2005) (holding that statement made to responding officer by "extremely upset" complainant alleging domestic violence was testimonial); Mason v. State, 2005 WL 1531286 (Tex. App. June 30, 2005); Lopez v. State, 888 So.2d 693 (Fla. App. 2004);

*v. Branch*, 865 A.2d 673 (N.J. 2005) (holding, against the weight of recent precedent and after extensive discussion of *Crawford* and "analysis . . . informed by the principles undergirding the Confrontation Clause jurisprudence of [the] federal and state constitutions," that excited utterance exception did not apply to accusation made to responding officer).

At the other end of the spectrum are courts that hold that if a statement fits within the excited utterance exception to the rule against hearsay, it cannot be testimonial. *E.g. United States v. Luciano*, 2005 WL 1594576 (1st Cir. Jul. 8, 2005) ("the initial statement that Camacho made to Officer Thornton when Camacho flagged down the Officer's cruiser immediately following the assault does not constitute 'testimonial hearsay' as used in *Crawford*. Instead, Camacho's statement appears to be an excited utterance that would qualify for admission at trial under as [*sic*] a hearsay exception."); *United States v. Brun*, ___ F.3d ___, 2005 WL 1797451 (8th Cir. Aug. 1, 2005) (after holding that statements made in 911 calls were excited utterances and not testimonial, holding that statements made to responding officer ten minutes later "were also excited utterances, *and therefore* nontestimonial statements")(emphasis added); *accord, e.g., State v. Banks*, 2004 WL 2809070 (Ohio App. 10th Dist. 2004) ("The holding in *Crawford* only applies to statements . . . that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present sense impression."). We believe these courts simply misread *Crawford*. Qualification under a "firmly rooted" hearsay exception was enough to satisfy the pre-*Crawford* reliability test of *Ohio v. Roberts*, 448 U.S. 56 (1980). It says nothing about whether the statement should be deemed to be testimonial under *Crawford*.

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State v. Grace, 111 P.3d 28 (Haw. App. 2005).

*Id.*, 541 U.S. at 61, 68 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . . [T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). If spontaneity is ever a significant factor suggesting that a statement is not testimonial, that is true *at most* when the statement was "made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.' *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694)." 541 U.S. at 58 n.8. This rigorous standard is far narrower than the modern hearsay exception for excited utterances articulated in Fed. R. Evid. 803(2) and counterparts in most states (including Indiana), which applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Finally, the largest group of courts, including the Indiana Supreme Court in this case, fall in the middle. These courts do not make the error of conflating the question of whether a statement is testimonial for purposes of the Confrontation Clause with a question concerning the bounds of a hearsay exception. And some of them would likely treat as testimonial a statement made in the circumstances involved in this case.[5] Nevertheless, courts in this group treat some accusatory statements made to police officers as non-testimonial even though a reasonable person in the declarant's position would anticipate prosecutorial use of the statement.

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[5] *See* State v. Meeks, 88 P.3d 789 (Kans. 2004) ("Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial.").

These courts take a wide variety of approaches. Some of them, like the Indiana Court of Appeals in this case, regard such an accusation as non-testimonial unless it was made formally. *E.g., Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004) (dictum); *People v. Jimenez*, 2004 WL 1832719 (Cal. App. 2d Dist. Aug. 17, 2004), *review denied*, Nov. 17, 2004, *cert. denied*, 125 S.Ct. 1713 (2005). We believe these courts stand logic on its head. The aim of the Confrontation Clause is to ensure that testimony be given under prescribed conditions. It therefore makes no sense to hold that if a statement is not given formally it is beyond the reach of the Clause; that is to treat a defect as a virtue.

Similarly, many courts hold statements to police officers to be non-testimonial unless they are made in response to interrogation. *E.g., Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (holding complainant's "statements to the police she called to her home" to be non-testimonial on the ground that "she, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home."); *see also, e.g., State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (holding non-testimonial accusatory statements made *in police station* because they were made while complainant "was still under the stress of the alleged assault," she "went to the police station on her own, not at the demand or request of the police," and "she was not responding to tactically structured police questioning"). Again, we believe this principle is plainly wrong: Under it, a complainant could submit directly to the police, or for that matter to the court, a written accusation and it would not be deemed testimonial because it was not made in response to interrogation.

Finally, many courts, like the Indiana Supreme Court here, do not regard as testimonial an accusation of a serious crime made to a police officer as testimonial unless

the police have first "secured" and "assessed" the scene. *E.g., Stancil v. United States*, 866 A.2d 799 (D.C. 2005) ("Police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger, are not obtaining information for the purpose of making a case against a suspect. Statements made to officers at this initial stage of the encounter – one might fairly call it 'securing the scene' – are not testimonial. . . . Here, where the responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial.") (internal quotation marks, brackets, deleted); *State v. Greene*, 874 A.2d 750 (Conn. 2005). They reach this conclusion despite the fact that a reasonable person in the complainant's position would understand that the accusation would almost certainly be used in prosecution of the accused – and no matter how much that prospect may have motivated her to make the accusation. These courts regard such statements as non-testimonial because *the recipient* of the statement had not drawn conclusions about the situation *until the statement was made*. But these courts would deem the identical statement to be testimonial if the police have already arrested the accused on the basis of other, similar statements – which would not be regarded as testimonial. *See State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005); *Drayton v. United States*, 2005 WL 1413862 (D.C. June 16, 2005).

No short summary can fully capture the range of approaches used by the lower courts on the question presented here, but we believe it is apparent that the conflict is sharp, irreconcilable, and important. Nothing will be gained by postponing this Court's

resolution of the matter. The conflict cannot be resolved without a decision by this Court. Delay will not shed any further light.

Delay would, on the other hand, entail severe costs. Every month, courts decide many cases fitting the mold of this one. If our analysis is wrong, then courts that exclude accusations in circumstances resembling those of this case would be needlessly and irrevocably impairing prosecutions. But if our analysis is right, then the greater number of courts would be violating a basic constitutional right of accused persons, and gratuitously tainting convictions in the process.

## II. THE DECISION BELOW REACHES AN INTOLERABLE RESULT THAT WOULD SIGNIFICANTLY UNDERMINE THE CONFRONTATION RIGHT.

Consideration of the opinion of the Indiana Supreme Court further demonstrates why it is necessary for this Court to resolve the question presented here. The opinion is thoughtful and gives the appearance of moderation. But we believe it makes several key analytical errors -- and the result it reaches is appalling. That result would allow virtually all oral accusations made to a police officer at the scene of a crime to be admitted against the person accused. The police would be offered a clear channel for evasion of *Crawford*. "Ask open-ended questions at the scene, repeatedly if need be; put nothing on paper until an accusation is made; and be prepared to testify that until that time you were unsure whether a crime had been committed."

### A. Even Taken On Its Face, the Decision Below States an Inappropriate Standard.

We will suggest below that the standard articulated by the Indiana Supreme Court is not the one that the court actually applied. But taking the decision on its face, we believe the standard that the court articulated incorporates three fundamental errors.

First, *under that standard the question of whether a statement is deemed to be testimonial is determined principally from the perspective of the questioner*. But this is plainly incorrect, because the participation of a questioner is not a prerequisite for a statement to be testimonial in nature. Suppose Amy had gone to the police station on her own initiative and said, "Here is an affidavit relating a battery committed on me by my husband. I hope you will use it to help convict him of the crime." Clearly, this is testimonial even though there was no questioner. The same conclusion would hold if she wrote her accusation in the form of a letter to a friend, and asked the friend to relay the accusation to the police. The Confrontation Clause gives the accused the right to confront the witnesses against him. The right would apply even if there were no police or even if – as was true until the 19th century – most crime was privately prosecuted. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U.PA. L. REV. 1171 1248 (2002) [hereinafter Friedman & McCormack, *Dial-In*]. It is true, as *Crawford* said, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." 541 U.S. at 55 n.7. But police officers and other government officials do not violate the Confrontation Clause by taking testimonial statements without offering the accused an opportunity to confront the witness; good police work will often require taking statements privately, as presumably it did in *Crawford* and in this case. The Clause is violated only when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness. That the statement in question was made to a government officer who was openly attempting to gather evidence for use in a

prosecution may be a significant factor supporting the conclusion that the statement is testimonial; that was true in *Crawford* and it is true in this case as well. But for a statement to be deemed testimonial, it is not essential that it be received by a government officer, or that such an officer be motivated by a desire to record evidence for trial.

Second, *under the decision of the Indiana Supreme Court, the critical question is one of motivation rather than anticipation*. That court speaks repeatedly of motivation and purpose. But this, we submit, is the wrong inquiry; instead, the question should be whether a reasonable person in the position of the declarant would *anticipate* use of the statement in litigation. Assume, as we have argued above, that the perspective of the witness-declarant is the proper one.[6] Many different motivations may impel a witness to

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[6] Even if, which we do not believe is true, the perspective of a police questioner is critical, the question is one of anticipation rather than motivation. In discussing the meaning of "interrogation," *Crawford* emphasized that it was using the term "in its colloquial, rather than any technical legal, sense," 541 U.S. at 53 n.4, and cited for comparison Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In *Innis*, the Court held that

> the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should know are reasonably likely* to elicit an incriminating response from the suspect.

(Emphasis added.)

Assuming *arguendo* that a concept of interrogation has significance for Confrontation Clause purposes, that concept must be at least as broad as the corresponding concept under *Miranda*. *Innis* explained that "[t]he concern of the Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299 (citation and internal quotation marks omitted). Thus, interrogation under *Miranda* "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. Of course, this is not true in the confrontation context: If the police, without any element of compulsion, question a witness who is entirely willing to incriminate the accused, and the accused never has an opportunity for cross-examination, the violation of the Confrontation Clause is clear.

make a testimonial statement: She may be responding to pressure, believing that her own status in the criminal justice system or other interests of hers (such as her ability to maintain custody of her children) are dependent on her making an accusation to the authorities. In some such cases, she might desire that the statement will never be used against the person she has accused. Or she might make the statement for purposes of personal expiation, or catharsis, or to secure her immediate personal safety. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"* (forthcoming, BROOKLYN L. REV.; preliminary draft available at http://confrontationright.blogspot.com/2005/02/grappling-with-meaning-of-testimonial.html) [hereinafter Friedman, *Grappling*], at 6-7. In none of these cases does the actual motivation of the declarant diminish the testimonial nature of the statement: Whatever her inner motivation may have been, she has knowingly created evidence that a reasonable person understands will likely be used by the criminal justice system. The jurisprudence of the Confrontation Clause should recognize that such statements are testimonial without the need to flail about in the dark in an attempt to understand the speaker's psyche.

Third, *under the decision below, if the person taking the statement is principally motivated by a desire to preserve the statement for potential use in legal proceedings, that is sufficient to render the statement "testimonial."* This principle, we submit, would extend the confrontation right *too* far; indeed, it would require a major change in police

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Indeed, the comparison points out why, in contrast to the *Miranda* rule, the Confrontation Clause can be violated even absent an interrogation. *Miranda* concerns statements by the accused himself, and the essence of the problem is that he has made the statements under the compulsion of custodial interrogation. The Confrontation Clause concerns statements made by persons *other than* the accused, and the concern – that the accused has not had an opportunity to confront the witness – holds whether the witness spoke in response to interrogation or entirely on her own initiative.

investigative practices. Suppose a conspirator makes a statement in support of the conspiracy to an undercover police officer or a confidential informant, who surreptitiously records the statement for evidentiary purposes. We do not believe that such a statement has ever been considered to violate the confrontation right. *See Crawford*, 541 U.S. at 58 (citing with approval, as among the Court's cases that, "in their outcomes, hew closely to the traditional line," *Bourjaily v. United States*, 483 U.S. 171 (1987), which "admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did not make prior cross-examination an indispensable requirement"); *United States v. Cunady*, 2005 WL 1637861 (4th Cir. Jul. 13, 2005) (unpublished) (statements made by conspirator to confidential informant held to be non-testimonial, "even under the broadest interpretation" of the term "testimonial," because declarant did not anticipate prosecutorial use). Nor should it be: The police officer may be trying to secure evidence from the declarant, as police secure evidence from many sources, non-human as well as human, but that does not make the process testimonial.

**B. The Ruling of the Court Below Invites Manipulation.**

The Indiana Supreme Court recognized that the Battery Affidavit written by Amy was testimonial; this point seems incontrovertible. But by holding Amy's oral statements to be non-testimonial, the court provided a clear path by which witnesses and police officers may cooperate in the creation of evidence that will not require the witness to subject herself to oath or cross-examination. First, the officer should conduct the interview at the scene of the alleged crime. Second, the officer should be prepared to testify that when he arrived at the scene the witness was still agitated or otherwise

appeared to be under the influence of the event in question and that until the witness made her critical statements he had not reached a conclusion as to whether a crime had been committed, and if so what. Third, until after the making of that statement, the officer should neither write anything down nor ask the witness to do so.[7]

If the officer follows this prescription, the prosecution can contend that the oral statement was procured to help "secure and assess" the scene, and under the Indiana Supreme Court's approach that will be enough for the statement to be characterized as non-testimonial and so avoid rigorous Confrontation Clause scrutiny. (It will also likely be enough for the statement to be characterized as an excited utterance, and so avoid a problem under hearsay law.) And this will be true irrespective of whether, in conducting the interview, the officer fully expected and hoped that the witness would accuse the defendant of a crime, and irrespective of the fact that, in making an accusatory statement to a police officer, a person of ordinary understanding in the witness's position would necessarily anticipate that the criminal justice system would in some way likely use the information just conveyed against the defendant.

This Court's decision in *Crawford* effectively ruled that testimony taken in the station-house rather than face-to-face with the accused and subject to cross-examination is not an acceptable method of proof. The decision of the Indiana Supreme Court in this case effectively rules that police may attain the same objective that *Crawford* denies

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[7] The Indiana Supreme Court recognizes that if the officer asks for a written statement as soon as the witness makes an oral one, that written statement is testimonial. Nevertheless, the officer has good reason to ask for such a statement then: If the witness testifies subject to cross-examination at trial, then, the Confrontation Clause "places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 (1970)." *Crawford*, 541 U.S. at 59 n. 9. And, under the decision of the Indiana Supreme Court, the officer has no reason *not* to ask for a written statement then, because doing so does not taint the conclusion that the oral statement was not testimonial.

them, by taking testimony at the crime scene instead. Ironically, the evidence allowed by the Indiana Supreme Court in this case is inferior to that rejected by *Crawford*. In *Crawford*, the statement was audiotaped, so that at least the jurors had no doubt about what the witness actually said and they could hear how Sylvia Crawford sounded as she made her statement. Here, all the trier of fact had to go on was the police officer's second-hand report of an oral statement made to him in the presence of no one else.

Consideration of the facts of the case confirms that, while the Indiana Supreme Court said that "responses to initial inquiries by officers arriving at a scene are typically not testimonial," in reality its decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene of a crime before any formal recording has been made is not testimonial.

Note first that although Amy's accusation resulted from what the court characterized as "the initial exchange between Mooney and Amy," the *actual* initial exchange – the one that was made when the officers "arriv[ed] at [the] scene" – was utterly unproductive from the viewpoint of the officers and, later, the prosecution. In *that* exchange, Officer Mooney asked Amy whether there was a problem and she answered in the negative. It was only after the officers went inside the house, looked around, spoke to Petitioner, met Amy separately from the Petitioner, and pressed the matter again that she made the accusation that was indispensable to Petitioner's conviction.

The court nevertheless concluded that at the time Amy made this accusation Officer Mooney was still "principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," and that "there is no suggestion that Amy wanted her initial responses [sic] to be preserved or otherwise used against her husband at trial." We

believe that the standard thus articulated by the court is incorrect, as we have explained above. But even apart form the question of standards, it is clear that the court applied inaccurately the standard it articulated. Consider the facts as Officer Mooney testified to them, virtually all of them elicited by the prosecution.

The officers arrived at the house in response to a report of a domestic disturbance. There they encountered Amy, who looked "somewhat frightened." (Of course, she had to look that way, for otherwise the "excited utterance" exception would not apply.) The officers declined to accept Amy's denial that anything untoward had happened ("I didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighten[edn]ess" T.T. 18, p. A30), and went inside the house. There they saw signs of a recent physical disturbance – a broken gas heating unit, with flames emerging from it and glass lying on the floor in front. Officer Mooney inferred that the unit had been broken recently (T.T. 10, p. A26) and that this was the result of the altercation that had led to the report of a domestic disturbance.[8] The officers also met Petitioner, who acknowledged in response to a question that he and Amy had just had an argument; his denial that the dispute had become physical was clearly in his self-interest. *Cf.* T.T. 24, p. A31 (testimony by Mooney of his experience of batterers lying to him). The officers then insisted that Petitioner and Amy be separated: Officer Richard remained with

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[8] The exchange in Mooney's direct examination leading up to his description of the broken heating unit was as follows:

> Q In your opinion, was there something that you observed in the premises to indicate why you were dispatched to that location?
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> A Yes.

T.T. 10, p. A26.

Petitioner in the kitchen. T.T. 24, p. A31, and Officer Mooney went to speak with Amy in the living room. T.T. 11, p. A27.[9] This time she made the critical accusation. *Id.*

And what did Officer Mooney do, armed with this new information, to assess and secure the scene? In compliance with his routine practice, he brought out an affidavit form for her to complete and sign, which she did.[10] There is no indication in the record that he had to leave the house to get the form.

In this setting, we submit, it is obvious that Officer Mooney did not take Amy's statement to "secure" the scene. The officers needed no new information to secure the scene: they knew who and where the protagonists were. Indeed, the scene was already secure – Amy and Petitioner were separated, one officer with each of them. In any event, Mooney's next move after receiving the oral statement did nothing to make the scene more secure. It was simply an effort to record evidence.[11]

We believe it is also obvious that, if Amy's statement is deemed to have been taken for the purpose of assessing the scene and not "in significant part for purposes of . . .

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[9] According to Mooney, Petitioner came into the living room at least twice while Mooney was speaking with Amy. T.T. 24, p. A31, and Mooney insisted that they remain separated so the officers could investigate. T.T. 26, p. A33.

[10] Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. [sic] Hammon?

A I had her fill out and sign a battery affidavit and I asked her if she would.

T.T. 12, p. A28.

[11] Q And what's the purpose of that document?

A To establish events that have occurred previously.

T.T. 12, p. A28.

potential future use in legal proceedings." 829 N.E.2d at 456, then there is a *per se* rule that a witness may make an oral accusation at the scene of a crime and not be subject to confrontation. Given that Mooney's very next step, pursuant to his routine, was to procure a written affidavit from her, it seems obvious that at least "in significant part" he took the oral statement "for purposes of . . . potential future use in legal proceedings."

Furthermore, by the time Amy made her accusation, Officer Mooney had, by his own account, considerable evidence, enough to press the matter a second time with Amy, that Petitioner had committed a battery on his wife – the original disturbance report, Amy's frightened demeanor, Petitioner's acknowledgment that there had been an argument, and the physical signs of a very recent disturbance. Of course, it was possible that no crime had been committed (and we do not admit that one had been), but that is always true; it is not the job of the investigating officer to determine guilt beyond a reasonable doubt. Even after hearing an accusation, the officer may have considerable doubt as to whether a crime has been committed. In any event, *before* an accusation has been made, the officer will always have – and will always be able to testify that he had significant doubt on that score. If that is enough to render a statement non-testimonial, as the Indiana Supreme Court held in this case, then the first accusation made orally and at the scene will never be deemed testimonial, no matter how strong the officer's understanding may be beforehand that one consequence of his efforts will be the gathering of evidence for potential use in prosecution.

Nor does the court's supposed consideration of Amy's motivation alter this fact. The court explicitly gave secondary importance to the declarant's motivation, 829 N.E.2d at 456, and it indicated in passing that Amy did not want her "initial responses" to be

used against Petitioner at trial. But the court provided no support for this conclusion, which we think is patently dubious at best. Whatever her reluctance and mix of feelings, Amy was making a knowing accusation of a serious crime to an investigating officer; the only plausible conclusion is that she anticipated prosecutorial use of this accusation, and she should be deemed to have intended this natural consequence of her actions.[12]

Finally, the statement cannot be deemed non-testimonial on the ground that it was spontaneous. The Indiana Supreme Court approved admission of the statement under the state's broadly applied excited utterance exception to the rule against hearsay (without even need for proof of how long before Amy made her statement the alleged incident occurred or the initial report of a domestic disturbance was made), but as discussed above that has no bearing on the Confrontation Clause question. And, whatever the significance of the more rigorous standard suggested by *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694), may be, the statement clearly did not satisfy it. That is, the statement was not made "immediat[ely] upon the hurt received, and before [Amy] had time to devise or contrive any thing for her own advantage." By Officer Mooney's account, Amy clearly had more than ample "time to contrive," because her first response to his questions was to deny that there had been a problem; if the accusation she later made was true, then her initial denial was a deliberate falsehood.

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[12] In response to a question posed as part of the pre-sentence investigation, Petitioner said:

> My wife and I were arguing. My wife tryed [sic] to explain to officers that everything was fine and they told her that if she did not sign a statement against Her Husband [sic] they would take her children away.

R.A. 30, p. A34.

## III. THIS CASE IS AN IDEAL VEHICLE FOR REFINING THE MEANING OF THE TERM "TESTIMONIAL."

For several reasons, this case is an excellent one for the Court to begin refining the meaning of "testimonial" and thus giving clearer meaning to the scope of the Confrontation Clause.

First, this is an uncluttered case. The case comes to this Court on direct appeal. Its outcome is completely dependent on resolution of the merits of the Confrontation Clause issue. There is no question of harmless error: Indeed, it is clear that, apart from Amy's statements, there was not sufficient evidence to support a judgment that Petitioner had committed a battery on her. The only plausible federal ground on which her statements might be excluded is the Confrontation Clause. Petitioner has preserved the issue from the start. At trial, before this Court's decision in *Crawford*, he objected to introduction of statements by Amy on the ground that he had not had an opportunity for cross-examination, and after *Crawford* the state court of appeals and supreme court both considered the Confrontation Clause issue without any suggestion that the issue was not preserved.

Second, there is no issue of forfeiture here. That is, there is no basis on which the courts could have concluded that the Petitioner forfeited the confrontation right by wrongfully rendering the witness unavailable. *Cf. State v. Ferguson*, 607 S.E.2d 526 (W.V. 2004), *petition for cert. filed* 73 U.S.L.W. 3604 (Apr. 1, 2005) (No. 04-1328) (statements by murder victim).

Third, deciding the case would allow the Court, if it wished, to continue to take the prudent, step-by-step approach toward defining the Confrontation Clause that it took in

*Crawford*. Reversal here would require the Court only to say that conducting an interview early on at the alleged crime scene rather than somewhat later at the station house, and not making any record of the interview until after the witness makes the first accusatory statement, does not alter the fact that an accusation of crime knowingly made to the police is clearly testimonial. The Court would not have to resolve the issue of whether a statement can be testimonial even if not made to a government official. *compare, e.g., People v. Sisavath*, 13 Cal. Rptr.3d 753 (Cal. App. 2004) (holding in the affirmative), *with People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) (holding in the negative); the statement here *was* made to a government official. The Court would not have to resolve the issue of whether a statement can be testimonial even if a government official did not attempt to secure it; a government official *did* solicit this statement.[13] Nor would the Court have to resolve the issues surrounding statements made contemporaneously with the commission of a crime, as occurs most notably during some 911 calls.[14]

In deciding this case, the Court may wish to discuss further the general standard for determining what statements are testimonial. But the treatment by many lower courts of

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[13] To be clear, we believe that a statement can be testimonial even though not made to a government official and even though not made in response to interrogation. Friedman, *Grappling*, *supra*, at 10-16. Emphasizing that the key consideration is "the reasonable expectations of the declarant," the Court of Appeals for the Tenth Circuit has recently held that an utterance made to police was testimonial despite the fact that there had been no questioning and the speaker had not even been read his *Miranda* rights. *Summers*, *supra*, ___ F.3d at ___, 2005 WL 1694031, at *10.

[14] We believe that many statements made during 911 calls, such as those involved in *State v. Davis*, 111 P.3d 844 (Wash. 2005), *petition for cert. filed* (Jul 8, 2005) (No. 05-5224), are clearly testimonial. *See* Friedman & McCormack, *Dial-In*, 150 U.PA. L. REV. at 1242-43.

the type of statement involved here, accusations made to responding officers, suggests that mere discussion of standards will not be enough to persuade some courts that *Crawford*'s re-invigoration of the Confrontation Clause requires a significant change in the way they have been doing business. *Cf.* Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington, 13 JUVENILE AND FAMILY JUSTICE TODAY, No. 2 (Summer 2004) (arguing that courts can avoid *Crawford* by invoking the "excited utterance" exception). Whether the Court attempts to articulate general standards or not, forthright decision of a responding-officer case will put suitable emphasis behind *Crawford*. "We really mean it!" is the message that lower courts need to hear, and that decision of this case can send.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 5th day of August, 2005

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